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No. 88–64

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

KALIMA JENKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS KALIMA JENKINS, *et al.*

STATEMENT OF THE CASE

Plaintiffs' counsel come before this Court seeking affirmance of the fees awarded them for having proven unconstitutional segregated education in Kansas City, Missouri — and having obtained extensive remedies that hold real promise of equal educational opportunity and meaningful desegregation.

The victory was neither swift nor easy.

A. The Desegregation Litigation

In 1977, twenty-three years after *Brown* v. *Board of Education*, 347 U.S. 483 (1954), segregation still infected the education of black children in the Kansas City School District (the "School District"). The School District, its School Board, and the children of two School Board members commenced this action, seeking desegregation remedies against the State of Missouri and others.

In 1979, Arthur Benson entered an appearance on behalf of the plaintiff school children. Mr. Benson and his small staff prosecuted the case through three years of extensive motion practice and discovery. By 1982, however, it was apparent that this bitterly contested litigation would require resources far beyond Mr. Benson's. The School District, which had been realigned as a nominal defendant, admitted its historic responsibility for discrimination and supported plaintiffs. But the State — whose pre-*Brown* laws required segregation, and which had done virtually nothing post-*Brown* to end segregation — fought this litigation at every step, and with every resource at its disposal. And so, Mr. Benson sought and obtained the assistance of the NAACP Legal Defense and Educational Fund, Inc. ("the LDF"), a nonprofit organization dedicated to the enforcement of civil rights. The LDF entered the case as Mr. Benson's co-counsel in March 1982.

In September 1984, after a 92-day bench trial, the district court held the State defendants and the School District liable. *Jenkins* v. *Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984). In June 1985, after a further two-week hearing on remedies, plaintiffs obtained an order requiring $37 million in capital improvements and $50.7 million in new operating programs. *Jenkins* v. *Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd in part, mod. in part*, 807 F.2d 657 (8th Cir. 1986) (en banc).

While the initial remedial order was on appeal, and after the appeal, the district court ordered greatly increased relief: an initial $25 million magnet-school plan, later expanded by $196 million, and long-range capital improvements totalling $260 million. The court of appeals affirmed. *Jenkins* v. *Missouri*, 855 F.2d 1295 (8th Cir. 1988).

Achieving these results in the face of Missouri's recalcitrance was not easy. From 1979, Mr. Benson and attorneys he employed devoted 10,875 hours to the case. His law clerks (working law students) and paralegals worked 8,108 hours. From early 1983 to the end of 1985, Mr. Benson devoted nearly all of his professional time to this case — he could accept no other employment. Although his dedicated associates and employees agreed to defer payment for overtime work, he paid them their base salaries throughout the litigation. He

exhausted his personal resources and was able to persist only by borrowing $633,000. Through December 31, 1986, he paid $113,706 in interest on this debt and continued to pay approximately $5,000 a month (Benson Aff., filed Jan. 16, 1987; Tr. 131-32).

Beginning in 1982, LDF attorneys spent 10,854 hours on the case. Recent law school graduates, law clerks and paralegals worked 15,517 hours. This was the most expensive case in which the LDF had ever been involved; largely because of it, the LDF had deficits of $700,000 in 1983 and more than $1 million in 1984 (Tr. 46, 48; Pl. Ex. 2).

B. The Fee Award

Mr. Benson and the LDF, as attorneys for the prevailing plaintiffs, filed applications under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("Section 1988"). The district court held a one-day hearing, at which plaintiffs presented four witnesses. The State presented no witnesses; it did no more than ask Mr. Benson a few clarifying questions about his application (Tr. 121-30).

On May 11, 1987, the district court issued an opinion meticulously analyzing the positions of the parties. The court awarded Mr. Benson fees and expenses of $1,614,437 for work on the merits, and $72,702 for the fees litigation. The court later awarded Mr. Benson an additional $42,090 for monitoring fees and expenses, bringing the total Benson fees judgment to $1,729,230. The court awarded the LDF fees and expenses of $2,323,730 for work on the merits, and $42,145 for work on the fees litigation, for a total LDF judgment of $2,365,875. [1/]

1/ Counsel did not request fees for all the time spent on the litigation. In compliance with *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), the applications excluded 3,628 attorney hours and 7,046 hours for paralegals, law clerks and recent law graduates, representing time allocable to unsuccessful claims. Based on the hourly rates actually awarded, these reductions amounted to more than $700,000. The district court required a further reduction of 3.5 hours in the LDF application (Pet. App. A32).

The court found that current market rates for Kansas City attorneys with litigation experience and expertise comparable to Mr. Benson's ranged from $125 to $175 an hour, and that Mr. Benson's rate "would fall at the higher end of the range based on his expertise in the area of civil rights" (Pet. App. A26). The court applied a small enhancement to Mr. Benson's time, awarding him $200 an hour to compensate for "preclusion of other employment," the "undesirability of this case" and "delay in payment" (*id.*). The court based its award for the work of the other attorneys, as well as paralegals, law clerks and recent law graduates, on current Kansas City market rates, "to compensate . . . for the delay in payment" (*id.*; *see also id.* at A30, A33, A34).

SUMMARY OF ARGUMENT

Section 1988 authorizes the federal courts to award prevailing civil rights plaintiffs "a reasonable attorney's fee as part of the costs." The courts below did so. Before this Court, the State raises two objections to the award. Each is without merit.

1. The State contends that the courts below, by considering delay in payment in assessing a "reasonable" fee, awarded "prejudgment interest" (Pet. Br. 9, 21). This violates the Eleventh Amendment, the State claims, because Section 1988 does not provide for prejudgment interest against the states "in unmistakable language" (*id.* at 11).

The Eleventh Amendment, however, does not apply to fee awards in actions for prospective relief, such as this. Moreover, Section 1988, enacted pursuant to the Fourteenth Amendment, abrogates any immunity the states might otherwise enjoy. The Eleventh Amendment does not require that such a statute authorize compensation for delayed payment "in unmistakable language" or in any particular form. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), on which the State relies, has no application to the Eleventh Amendment.

Moreover, this case — an action by citizens of a state against that state — does not fall within the plain language of the Eleventh Amendment. *Hans* v. *Louisiana* 134 U.S. 1 (1890), which held the Eleventh amendment applicable to such cases, should be overruled.

2. The State contends that the courts below erred in awarding fees for paralegals at market rates rather than "cost" (Pet. Br. 24–27). Neither the language of Section 1988, nor its legislative history, nor any decision of this Court supports the State's position. Indeed, this Court has specifically rejected the view that fees under Section 1988 should "be calculated according to the cost of providing legal services rather than according to the prevailing market rate." *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984). The result Missouri seeks would undermine the purpose of Section 1988 by discouraging private enforcement of the civil rights laws. It would also promote costly, inefficient litigation by pressuring lawyers to do work that could be done by paralegals.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT BAR COMPENSATION FOR DELAY IN PAYMENT

The State does not suggest that the Eleventh Amendment restricts Congress' power to authorize fee awards against the states. Nor does the State dispute Congress' power to authorize compensation for delay. Rather, the State contends that such compensation constitutes "interest," and that the Eleventh Amendment bars the federal courts from awarding interest against a state absent a specific, explicit statutory mandate. Neither precedent nor policy supports the State's view.

A. This Court's Eleventh Amendment Decisions Do Not Support The State's Position

This Court has held that the Eleventh Amendment requires "an extraordinarily explicit statutory mandate" before a federal court may infer that Congress has authorized it to hear certain claims

against the states. *Hutto* v. *Finney*, 437 U.S. 678, 695 (1978). Where it applies, this requirement "insures that Congress has not imposed 'enormous fiscal burdens on the States' without careful thought." *Id.* at 697 n.27 (quoting *Employees* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973)). Accordingly, before a federal court may hear a federal claim against a state for retroactive, monetary relief, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakably clear language in the statute itself." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985). Relying on *Atascadero* and similar decisions, the State contends that the fee awards in this case were impermissible, because Section 1988 does not expressly refer, "in the statute itself," to liability of the states or compensation for delay (Pet. Br. 16).

The State's reliance is misplaced. The stringent standards for abrogation set forth in this Court's Eleventh Amendment decisions do not address litigation costs. Rather, they are informed and limited by concern for the "enormous fiscal burdens" that *retroactive liability for prelitigation conduct* may impose upon the states. Moreover, those decisions have no bearing on the issue here — the scope of a statute that lawfully and undisputedly applies against the states.

In *Hutto*, the Court held that Section 1988 authorizes costs, including attorneys' fees, against state defendants, notwithstanding the Eleventh Amendment. Two rationales compelled this conclusion. First, Section 1988 "imposes attorney's fees 'as part of the costs,'" and the Court "has never viewed the Eleventh Amendment as barring such awards." 437 U.S. at 695; *see Maher* v. *Gagne*, 448 U.S. 122, 131-32 & n.14 (1980). Second, "even if the Eleventh Amendment would otherwise present a barrier to an award of fees against a state, Congress was clearly acting within its power under § 5 of the Fourteenth Amendment in removing that barrier." *Maher*, 448 U.S. at 132. Either of these rationales disposes of Missouri's claim to immunity.

1. The Eleventh Amendment Does Not Apply to Awards of Costs or to Interest on a Component of Costs

In enacting Section 1988, Congress provided the statutory authorization necessary to award attorney's fees to prevailing civil rights plaintiffs. *See Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975). This Court's decisions make clear that the Eleventh Amendment has no effect on this statute.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Court held that the Eleventh Amendment bars actions in federal court seeking to impose retrospective monetary liabilities on the states. *Id.* at 668. The Court distinguished prospective relief, even though prospective relief may have "an ancillary effect on the state treasury." *Id.* [2/] As the Court has explained, "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). But "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Id.*; *see also Papasan* v. *Allain*, 478 U.S. 265, 278 (1986).

In holding Section 1988 applicable to the states in *Hutto*, the Court rested its decision squarely on this distinction. The Court recognized that the Eleventh Amendment requirement of "an extraordinarily explicit statutory mandate" is limited to "retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief." 437 U.S. at 695. The Court emphasized that, since 1849, "[c]osts have traditionally been awarded without regard for the States' Eleventh Amendment immunity," and that "[t]he Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Id.* (citations and footnote omitted).

2/ *See also Quern* v. *Jordan*, 440 U.S. 332 (1979) (mailing to inform class members of legal rights in federal court); *Milliken* v. *Bradley*, 433 U.S. 267 (1977) ($6 million in prospective relief).

Accordingly, the Court held that the Eleventh Amendment does not affect attorney's fees under Section 1988, because they are "part of the costs," rather than retroactive liability:

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

Id. at 695 n.24. And because the Eleventh Amendment does not apply, attorney's fees may be awarded against the states *without* an "explicit statutory mandate" from Congress:

> Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity.

Id. at 696.

The Court reaffirmed the vitality of the retroactive–prospective distinction in *Quern* v. *Jordan*, 440 U.S. 332, 344–45 n.16 (1979), and in *Maher* v. *Gagne*, 448 U.S. 122, 131 n.14. *(1980). See also Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105–06 (1984) ("*Pennhurst II*"). No Eleventh Amendment decision of this Court has required an "explicit statutory mandate" for prospective relief from a violation of federal law, or for awards of costs incurred in obtaining such relief. 3/

3/ *See Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2944 & n.1 (1987) (action for damages under the Jones Act); *Atascadero*, 473 U.S. at 235 ("retroactive monetary relief under § 504 of the Rehabilitation Act of 1973"); *Pennhurst II*, 465 U.S. at 91 (state law claim); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 24 (1980) ("*Pennhurst I*") (no violation of federal law; "Congress must express clearly its intent to impose conditions on the grant of federal funds"); *Employees* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 281 (1973) (overtime compensation under Fair Labor Standards Act of 1938).

This distinction negates any inference that the Eleventh Amendment affects compensation for delay in payment of attorney's fees under Section 1988. Such compensation does not constitute "retroactive liability for prelitigation conduct." *Hutto*, 437 U.S. at 695. It does not "compensate the plaintiff for the injury that first brought him into court." *Id.* at 695 n.24. Merely ancillary to prospective substantive relief, compensation for delay in a fee award is part of a remedy "designed to end a continuing violation of federal law," *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); it does not "compensate a party injured in the past by an action . . . that was illegal." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986).

The State, relying on *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), contends that compensation for delay in payment of attorney's fees is "damages," not "costs" (Pet. Br. 19). But *Library of Congress* does not support the State's position. In that case, the Court applied the "no–interest rule," a longstanding rule of statutory construction applicable in actions against the federal government. As the Court stated the rule:

> In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.

478 U.S. at 314. Under this standard, the Court held that the attorney's fees provision of Title VII, 42 U.S.C. § 2003e-5(k), does not authorize prejudgment interest on fees awarded against the federal government. Although the statute authorizes "a reasonable attorney's fee as part of the costs" and provides that "the United States shall be liable for costs the same as a private person," the Court held that these references to "costs" do not satisfy the stringent requirements of the no–interest rule. As the Court observed, "Prejudgment interest . . . is considered as damages, not a component of 'costs.'" 478 U.S. at 321.

The distinction between "costs" and "damages," while significant in *Library of Congress*, is immaterial here. First, the issue here is not whether compensation for delay in payment of costs is "costs" or "damages." The issue under the Eleventh Amendment is only whether

such compensation constitutes "retroactive liability for prelitigation conduct," *Hutto*, 437 U.S. at 695 — clearly it does not.

Second, *Library of Congress* rested on the federal government's sovereign immunity, which specifically includes an immunity from the award of any costs, absent the government's consent. *See United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 20–21 (1926). The statute at issue in *Library of Congress* was thus a waiver of immunity from "costs," to be strictly construed. *Library of Congress*, 478 U.S. at 318. And the view of prejudgment interest as "damages, not a component of 'costs,'" informed the Court's determination that Congress' general reference to "costs," did not satisfy the stringent requirements of the no–interest rule. *Id.* at 321.

Here, by contrast, the states do not enjoy any Eleventh Amendment immunity from costs comparable to the sovereign immunity of the federal government. *See Hutto*, 437 U.S. at 695–97. A statute providing for costs against the states is thus not a waiver to be narrowly construed. Nor do the states enjoy the benefit of an Eleventh Amendment "no–interest rule" requiring the searching and technical examination into the meaning of "costs" that was appropriate in *Library of Congress*. (*See infra* pp. 14-19.) Here it is more appropriate to recognize that interest on costs is not any part of damages on the underlying claim; interest on costs is fairly only a part of costs.

2. The Eleventh Amendment Does Not Require Specific Statutory Reference to Compensation for Delay in Section 1988

Even if compensation for delayed payment of attorney's fees were a retroactive liability — though the attorney's fees themselves are not — that characterization would not affect the result in this case. Even if the Eleventh Amendment would otherwise immunize the states from compensation for delay in a fee award, Congress has abrogated that immunity. In holding that the Eleventh Amendment does not bar application of Section 1988 to the states, this Court reaffirmed that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment." *Hutto*, 437 U.S. at 693 (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). The Court held that Congress, in enacting Section 1988, "undoubtedly intended to exercise that power." *Id.* at 693.

The State contends that this exercise of Congress' power may not be construed to embrace compensation for delay in payment, absent a clear reference to such compensation in the statute itself (Pet. Br. 12). While the State seeks to ground this requirement in the Eleventh Amendment, none of this Court's Eleventh Amendment decisions suggests such a rule. Of the cases on which the State relies, only *Atascadero* held Congress' intent insufficiently clear to abrogate the Eleventh Amendment in enforcing the Fourteenth Amendment. And the issue in *Atascadero* was whether a particular statute (Section 504 of the Rehabilitation Act of 1973) authorized actions against the states at all. Neither *Atascadero* nor any of this Court's other decisions suggests that the requirement of "unmistakably clear language" might apply in determining *the scope* of a statute, such as Section 1988, that undisputedly abrogates the states' Eleventh Amendment immunity.

The State cannot and does not dispute that Section 1988 applies against it. It cannot and does not dispute that the balance required by the federal system has been struck in favor of fee awards against the states when they have violated the civil rights laws. The State contends only that one of the natural incidents of such awards — compensation for delay in payment — occupies a special position and requires separate, explicit congressional authorization. This contention has no more basis in the Eleventh Amendment than it does in logic.

This Court has never held that the Eleventh Amendment requires a separate, express reference to prejudgment interest, or compensation for delay, before a state may be held liable for such payments under a federal statute that otherwise lawfully applies to it. And

the lower courts have routinely made such awards under Section 1988, as well as under other statutes that create rights against the states. 4/ Indeed, even where an express waiver of Eleventh Amendment immunity by the state is required, no separate, express waiver respecting prejudgment interest has previously been considered necessary. *See Platoro, Ltd.* v. *Unidentified Remains of a Vessel*, 695 F.2d 893, 906 & n.20 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983).

The state urges that "the Eleventh Amendment issue was not raised" in cases such as these (Pet. Br. 10 n.6). Yet the one lower court case the state cites against these precedents did not consider "the Eleventh Amendment issue" at all. It merely assumed the existence of an "Eleventh Amendment immunity from prejudgment interest on fee awards," without explanation. *Rogers* v. *Okin*, 821 F.2d 22, 27 (1st Cir. 1987).

Nothing in this Court's Eleventh Amendment jurisprudence supports the assumption in *Rogers*. In *Welch* v. *Texas Department of Highways & Public Transportation*, 107 S. Ct. 2941 (1987), the Court elaborated the rationale behind the requirement that Congress express its intention to abrogate the Eleventh Amendment "in unmistakable language in the statute itself":

> We have been unwilling to infer that Congress intended to negate the States' immunity from suit in federal court, given the "vital role of the doctrine of sovereign immunity in our federal system." . . . Moreover, the courts properly are reluctant to infer that Congress has expanded our jurisdiction.

4/ *See, e.g., Lightfoot* v. *Walker*, 826 F.2d 516 (7th Cir. 1987) (Section 1988); *Grendel's Den, Inc.*, v. *Larkin*, 749 F.2d 945 (1st Cir. 1984) (same); *Ramos* v. *Lamm*, 713 F.2d 546 (10th Cir. 1983) (same); *Graves* v. *Barnes*, 700 F.2d 220, 224 (5th Cir. 1983) (fee award under 42 U.S.C. § 1973*l*(e)); *Behlar* v. *Smith*, 719 F.2d 950 (8th Cir. 1983) (backpay award under Title VII), *cert. denied*, 466 U.S. 958 (1984); *Chesser* v. *Illinois*, 1987 U.S. Dist. LEXIS 7398, at 12 (N.D. Ill. Aug. 11, 1987) (same); *Gelof* v. *Papineau*, 648 F. Supp. 912, 929, 931 (D. Del. 1986) (same), *aff'd in part, vacated in part on other grounds*, 829 F.2d 452 (3d Cir. 1987); *Liberles* v. *Daniel*, 26 Fair Empl. Prac. Cas. (BNA) 547, 26 Empl. Prac. Dec. (CCH) ¶ 31,816 (N.D. Ill. March 20, 1981) (same), *aff'd in part, rev'd in part on other grounds*, 709 F.2d 1122 (7th Cir. 1983).

Id. at 2946 (quoting *Pennhurst II*, 465 U.S. at 99). These considerations properly require a searching inquiry before courts conclude that Congress intended a particular enactment to impose retroactive liability on the states. As this Court has recognized, the requirement of a formal indication of Congress' intent "insures that Congress has not imposed 'enormous fiscal burdens on the States' without careful thought". *Hutto*, 437 U.S. at 697 n.27 (quoting *Employees* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973)).

But the needs of the federal system certainly do not suggest that compensation for delay should occupy any special place under the Eleventh Amendment, any more than any other particular that "a reasonable attorney's fee" may embrace. The State contends that including compensation for delay in fee awards would "impose what could be a substantial financial obligation on the States" (Pet. Br. 22). Admittedly, the state treasuries will pay somewhat greater awards if they must compensate for delay. But the same is true "whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs." *Hutto*, 437 U.S. at 697. And "it would be absurd to require an express reference to state litigants" for each such item. *Id.* at 696–97. Indeed, the State's contention is belied by the circumstances of this case. The total fee award here — approximately $4 million for nearly a decade of litigation — is about one percent of the cost of the substantive remedies ordered to date. The compensation for delay is only a fraction of that one percent. To the State, the additional burden is inconsequential — only to the attorneys is it significant.

Nor does the inclusion of compensation for delay constitute an expansion of the federal courts' jurisdiction. Congress has by statute given the federal courts jurisdiction to entertain applications for costs, including attorney's fees, against the states. It cannot be a further expansion of jurisdiction to consider, in assessing such awards, all the factors normally required by the statute's purposes, including delay in payment.

B. *Library of Congress* v. *Shaw* Is Not Controlling

The State contends that *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), proscribes compensation for delayed payment in any fee award against a state under Section 1988. As the State would have it, the no–interest rule applied in *Library of Congress* is a principle of Eleventh Amendment jurisprudence. That view, however, finds no support in *Library of Congress*, which has nothing to do with the Eleventh Amendment, does not mention the Eleventh Amendment and does not rely on any precedent construing the Eleventh Amendment.

1. The No–Interest Rule Cannot Be Extended to the Eleventh Amendment

In *Library of Congress*, the Court traced the history of the no–interest rule to the "historical view that interest is an element of damages separate from damages on the substantive claim," and the corollary common–law rule that, because interest was "generally presumed not to be within the contemplation of the parties," courts in England "allowed interest by way of damages only when founded upon agreement of the parties." 478 U.S. at 314–15 (footnote omitted). The Court noted that the common–law requirement of an agreement gradually faded in suits between private parties, but "assumed special force when applied to claims for interest against the United States," since "[a]s sovereign, the United States, in the absence of its consent, is immune from suit." *Id.* at 315. As the Court stated, "This basic rule of sovereign immunity, in conjunction with the requirement of an agreement to pay interest, gave rise to the rule that interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress." *Id.* This explanation of the no–interest rule demonstrates its inapplicability here.

First, the common–law requirement of an agreement to pay interest can have no effect where, as here, Congress has acted to enforce the Fourteenth Amendment. When Congress has done so, the states' consent to suit is irrelevant:

> Congress can abrogate the Eleventh Amendment without the States' consent when it acts pursuant to its power "'to enforce, by appropriate legislation' the substantive provisions of the Fourteenth Amendment."

Welch v. *Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2946 (1987) (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976)).

Congress undoubtedly had the power, in Section 1988, to require fee awards, including compensation for delay, with or without states' agreement. The only question is whether Congress made that choice. All the available evidence indicates it did. (*See infra* pp. 21-26.)

Second, the "basic rule of sovereign immunity" relied on in *Library of Congress* is not applicable to actions governed by the Eleventh Amendment. It derives from the common–law doctrine under which the sovereign was immune, absent its consent, "from suit in its own courts." *Nevada* v. *Hall*, 440 U.S. 410, 414 (1979); *see also The Siren*, 7 Wall. (74 U.S.) 152, 154 (1868) ("It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent."). That common–law doctrine has origins — and contours — very different from those of the constitutional immunity embodied in the Eleventh Amendment.

The common–law doctrine "had its origins in the feudal system," under which "no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord. Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued." *Nevada* v. *Hall*, 440 U.S. at 415 (citing F. Pollock & F. Maitland, *History of English Law* 518 (2d ed. 1899); Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. Colo. L. Rev. 1, 2–5 (1972)). The doctrine has been explained also as embodying a fundamental attribute of sovereignty, "the right to determine what suits may be brought in the sovereign's own courts." *Id.* Thus, Justice Holmes explained sovereign immunity as based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (1907),

quoted in Nevada v. *Hall*, 440 U.S. at 415–16. Accordingly, the common-law doctrine of sovereign immunity does not apply to actions against a sovereign in the courts of another, co-equal (or "higher") sovereign.

The Eleventh Amendment, by contrast, embodies a constitutional principle that is necessarily subject to the demands of our federal system. In particular, the immunity conferred by the Eleventh Amendment must be reconciled with "the need to promote the vindication of federal rights." *Pennhurst II*, 465 U.S. at 105; *see also Papasan* v. *Allain*, 478 U.S. 265, 276–78 (1986); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). There is thus no reason to assume that immunity under the Eleventh Amendment is coextensive with the sovereign's common-law immunity from suit in its own courts.

Nothing in the "structure and requirements of the federal system," *Welch*, 107 S. Ct. at 2953, requires this Court to read a no-interest rule into the Eleventh Amendment. Once Congress has determined, as it did with Section 1988, that a particular federal policy merits enforcement against the states, Congress has declared that the usual federal–state balance does not obtain. And the requirements of the federal system dictate that the state is, to that extent at least, no longer sovereign, but is subject to the same rights and liabilities as other parties. The applicable principle of federalism is that articulated in *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927):

> Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.

Id. at 74. Specifically in the matter of costs — the issue under Section 1988 — "a federal court may treat a State like any other litigant." *Hutto*, 437 U.S. at 696.

Third, even if the constitutional immunity of the states under the Eleventh Amendment were coextensive with their common-law immunity as sovereigns in their own courts, that would not require application of a no-interest rule here. Although common-law notions of sovereign immunity are a necessary predicate to the no-interest

rule, it is far from clear that the rule is an inescapable feature of common-law sovereign immunity. The State of Missouri, for example, does not apply such a rule in its own courts. While Missouri has a general statute authorizing awards of prejudgment interest, the statute does not explicitly provide for such awards against the state. Mo. Rev. Stat. § 408.020 (1986). [5/] The Missouri courts, however, apply it against the State. [6/] The no-interest rule, which Missouri itself does not credit, cannot reasonably be considered so basic to sovereign immunity as to warrant being enshrined in the Constitution. [7/]

[5/] Section 408.020 provides:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

[6/] *Denton Constr. Co.* v. *Missouri State Highway Comm'n*, 454 S.W.2d 44 (Mo. 1970); *Steppelman* v. *State Highway Comm'n.*, 650 S.W.2d 343, 345 (Mo. App. 1983); *Bernard McMenamy Contractors, Inc.* v. *Missouri State Highway Comm'n*, 582 S.W.2d 305 (Mo. App. 1979).

[7/] Alternatively, the Missouri decisions awarding prejudgment interest against the State may be viewed as construing § 408.020 to waive any no-interest immunity that might otherwise exist. Specifically, an award of attorney's fees meets the standards of Section 408.020. *See Laughlin* v. *Boatmen's Nat'l Bank*, 354 Mo. 467, 189 S.W.2d 974 (Mo. 1945) (unliquidated claims for legal services); *Whalen, Murphy, Reid* v. *Estate of Roberts*, 711 S.W.2d 587, 590 (Mo. App. 1986) (error not to award prejudgment interest on an attorney's fees claim); *Knight* v. *DeMarea*, 670 S.W.2d 59 (Mo. App. 1984). And where Section 408.020 applies, its provisions are mandatory; *Denton Constr. Co.* v. *Missouri State Highway Comm'n*, 454 S. W. 2d (Mo. 1970); *St. Joseph Light & Power Co.* v. *Zurich Ins. Co.*, 698 F.2d 1351, 1355 (8th Cir. 1983); *see also Slay Warehousing Co.* v. *Reliance Ins. Co.*, 489 F.2d 214, 215 (8th Cir. 1974).

While a waiver of immunity in Missouri's own courts would be insufficient "to subject [it] to suit in federal court," *Atascadero*, 473 U.S. at 241 (emphasis omitted), Missouri is already subject "to suit in federal court," by virtue of the important federal policies embodied in the Fourteenth Amendment and the statutes implementing it. Thus, even if the Eleventh Amendment otherwise entailed an immunity from interest, federalism concerns would not justify its invocation by a defendant like Missouri, which has waived the immunity in cases where no national policy is involved.

2. The No-Interest Rule Would Be an Unreasonable Rule of Statutory Construction Here

Library of Congress in the last analysis did no more than apply an established principle of statutory construction in its traditional context. To apply the no-interest rule here would be a very different matter.

Library of Congress rested explicitly on a long-established and oft-repeated fixture of our national jurisprudence:

> For well over a century, this Court, executive agencies, and Congress itself have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result.

478 U.S. at 316. The Court cited numerous decisions, prior to the enactment of Title VII, the statute in issue, affirming and reaffirming the requirements of the no-interest rule. *See id.* at 315-17. The Court cited numerous opinions of Attorneys General, over the past 170 years, articulating the same rule. Indeed, the Court noted Congress' own recognition of the no-interest rule: "When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly." *Id.* at 318 (footnote omitted).

Congress acted against a very different background when it authorized the award of civil rights attorney's fees against the states. Congress specifically relied upon the fact that "the 11th Amendment is not a bar to the awarding of counsel fees against state governments." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 n.14 (1976) ("House Report") (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). Congress had no reason to suspect that a separate, express reference to interest or compensation for delay was necessary. There is no reason to ignore

Congress' purpose solely because it was not expressed in a particular form — a form that this Court has never previously required. [8/]

C. This Court Should Overrule *Hans* v. *Louisiana* if It Reaches the Question

If this Court were to conclude, with the State, that the Eleventh Amendment bars compensation for delay, it would then face the question whether the Eleventh Amendment applies in this case. The language of the amendment could scarcely be simpler, plainer or clearer: it prohibits only actions "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This action, however, involves claims by citizens of a state against their own state.

In *Welch*, four members of this Court reaffirmed the holding of *Hans* v. *Louisiana*, 134 U.S. 1 (1890), that the Eleventh Amendment embodies a principle of state sovereign immunity broader than its terms, extending to actions by a citizen of a state against that state. But four other members of the Court reaffirmed the view they expressed in *Atascadero*, 473 U.S. at 247-302 (Brennan, J., dissenting), that *Hans* misconstrued the Eleventh Amendment. *Welch*, 107 S. Ct. at 2958-70. They argued that the Eleventh Amendment does not bar claims under the federal question and admiralty jurisdictions or actions by a citizen against his or her own state. *Id.* Justice Scalia found it unnecessary to consider whether *Hans* was correctly decided, saying that Congress had enacted the statute in question (the Jones Act)

[8/] Even if the no-interest rule applied under the Eleventh Amendment, it would not apply here, because no interest was awarded. Unlike the award in *Library of Congress*, the award here was based on current market rates; it was not adjusted by an overall factor to compensate for all losses due to delay. Indeed, the record here shows that use of hourly rates could not fully compensate for lost interest (Tr. 113-16; Pl. Ex. 5, at 10; Ward Aff., filed Jan. 16, 1987). While the Court in *Library of Congress* stated that awards of interest, under any name, are forbidden absent the consent of the United States, the present case does not involve "simply . . . devising a new name for an old institution." *Library of Congress*, 478 U.S. at 321. Here, the method used — not just the name applied — was different from awarding interest. And this method, basing the lodestar on current market rates, was not before the Court in *Library of Congress*.

against the background of *Hans* and therefore could not have intended to grant to federal courts jurisdiction over actions against the states. *Id.* at 2957-58.

If the Court were now to conclude that the Eleventh Amendment includes a no-interest rule, this case would necessarily raise the question that Justice Scalia did not reach. In enacting Section 1988, Congress clearly intended that it apply against the states, as this Court has held. Rather than acting within the confines of *Hans*, Congress explicitly relied on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), which held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456 (citing *Hans*); *see* House Report at 7 n.14.

In urging the Court to overrule *Hans*, we have little to add to Justice Brennan's dissenting opinions in *Atascadero* and *Welch*. We do note, however, with all respect, that the plain language of the Eleventh Amendment is impossible to square with the holding in *Hans*. In its extraordinarily precise specificity — prohibiting suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" — it stands in stark contrast to the broad language of the first ten amendments. That specificity suggests an equally specific intent: to override the holding in *Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 419 (1793), which construed Article III to confer jurisdiction of precisely such suits, even where jurisdiction would not otherwise obtain. *See Welch*, 107 S. Ct. at 2964-68 (Brennan, J., dissenting).

We note also that the framers of the Eleventh Amendment would not likely have considered the states to need protection from Congress or, therefore, from the federal courts under the federal question jurisdiction. Congress was limited to enumerated powers, and the Tenth Amendment reserved to the states, and to the people, all powers not conferred on Congress. As this Court has recognized, the structure of the federal government provided whatever protection the states might need from the federal legislature:

> It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States

> from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections . . . They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State.

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985); *see also id.* at 549 ("'Interference with the power of the states was no constitutional criterion of the power of Congress.'") (quoting 2 Annals of Cong. 1897 (1791) (Madison)).

If the Constitution leaves Congress free to regulate the states under its commerce power — if the political process is presumed to afford the states any needed protection from such regulation — then surely the framers of the Eleventh Amendment did not believe that the same political process would be inadequate to protect the states, to the extent necessary, from claims arising under the Constitution and laws of the United States.

D. Section 1988 Authorizes Compensation for Delay in Fee Awards Against the States

Since Congress undisputedly has the power to require that the states compensate for delay in payment under Section 1988, and since the Eleventh Amendment imposes no special standard in determining whether Congress exercised that power, the ultimate question is whether Congress has done so.

The anwer is clear. As this Court has observed, Section 1988 "primarily applies to laws passed specifically to restrain state action." *Hutto*, 437 U.S. at 694. It "has a history focusing directly on the question of state liability." *Id.* at 698 n.31. According to the House Report:

> The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.

House Report at 7, *quoted in Hutto*, 437 U.S. at 694. To hold that Section 1988 applies against the states with any less force than against other parties would be to ignore Congress' intent. And Congress' purpose in Section 1988 – to attract first-quality lawyers to civil rights cases by providing fully compensatory fees – cannot be accomplished without compensation for delay.

Congress enacted Section 1988 in recognition of the important role of private plaintiffs in civil rights enforcement — a recognition that plaintiffs with meritorious civil rights claims "appear before the court cloaked in a mantle of public interest." *Id.* at 6. "The purpose of § 1988 is to ensure 'effective access to judicial process' for persons with civil rights grievances." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (citing House Report at 1).

Congress considered fee awards an "essential remedy," because civil rights plaintiffs often have little or no money with which to hire a lawyer. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) ("Senate Report"). In addition, the remedies in civil rights litigation may be "nonpecuniary in nature." *Id.* at 6. Such remedies provide no fund from which to pay a lawyer. *See generally City of Riverside* v. *Rivera*, 477 U.S. 561, 577–78 (1986). Without fee awards, private enforcement of the civil rights laws would thus be an empty promise — private citizens would have no "meaningful opportunity to vindicate the important Congressional policies which these laws contain." Senate Report at 2.

In view of the critical importance of private civil rights enforcement, it is necessary to attract first-rate lawyers to the task — persons deprived of their civil rights should not be sent to the back of the bus to find a lawyer — and Congress so understood. Congress sought "to attract competent counsel in cases involving civil and constitutional rights." House Report at 9. To accomplish this, Congress determined to compensate prevailing counsel in civil rights cases just

as in other complex litigation on behalf of paying clients. Fee awards under Section 1988 must be similar to what "is traditional with attorneys compensated by a fee-paying client." Senate Report at 6. Accordingly:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . .

Id., *quoted in Blum* v. *Stenson*, 465 U.S. 886, 893 (1984); *see also* House Report at 8–9. As this Court held in *Blum*:

> The statute and legislative history establish that "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community.

465 U.S. at 895. And where "a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435.

These principles require that fee awards include, in appropriate circumstances, an element of compensation for delay in payment. Lawyers typically bill their clients, and expect payment, on a current basis, monthly or quarterly. Indeed, lawyers are free to require advance payment of a fee. *Model Rules of Professional Conduct*, Rule 1.5 comment (ABA 1983). In contrast, an attorney enforcing the civil rights laws on behalf of an impecunious client must await payment until his or her client becomes a "prevailing party." And, of course, compensation delayed is compensation diminished. As inflation erodes the real value of currency, delayed payment has less value than prompt payment in the same amount. Moreover, obtaining money — and the use of it — earlier rather than later has a recognized economic value: in addition to losses from inflation, delayed payment entails a "real opportunity cost of capital." *Library of Congress*, 478 U.S. at 322 n.7 (citing R. Posner, *Economic Analysis of Law* 180 (3d ed. 1986)). As Judge Posner has put it:

> The usual assumption in economics as in life is that a dollar today is worth more than a dollar tomorrow, both because it

can be invested and earn interest and because the future is uncertain.

Heiar v. *Crawford County*, 746 F.2d 1190, 1203 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). Accordingly, this Court has recognized in other contexts that full compensation *must* include compensation for delay in payment. [9/]

These concerns take on special importance for fee awards under Section 1988, because civil rights litigation often takes many years before counsel receive any payment. [10/] A prevailing civil rights plaintiff's lawyer, absent compensation for delay, would receive less compensation — in most cases a great deal less — than he or she could have received doing the same work for a currently-paying client at reasonable market rates. And that result would flatly contravene Congress' objective that these lawyers receive what "is traditional with attorneys compensated by a fee-paying client." Senate Report at 6. A fee award diluted by the passage of time cannot be "fully compensatory." *Hensley*, 461 U.S. at 435.

The legislative history of Section 1988 demonstrates that awards must account for the hardship that results from delayed payment. The Senate Report cited *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), in which this Court upheld an interim fee award and noted:

> To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary. . . .

9/ *Loefler* v. *Frank*, 108 S. Ct. 1965, 1971 (1988) (backpay award under Title VII); *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648 (1983) (damages for patent infringement); *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947) ("just compensation" under Fifth Amendment); *Smyth* v. *United States*, 302 U.S. 329, 353–54 (1937) (same).

10/ *See, e.g., Hutto*, 437 U.S. at 681 (9 years); *Lightfoot* v. *Walker*, 826 F.2d 516, 517 (7th Cir. 1987) (14 years); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 628 (6th Cir. 1979) (19 years), *cert. denied*, 447 U.S. 911 (1980); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 484 (W.D.N.C. 1975) (7 years).

Id. at 723, *cited in* Senate Report at 5. And so, in discussing the timing of awards under Section 1988, the Senate Report stated that "[i]n appropriate circumstances, counsel fees under [Section 1988] may be awarded pendente lite." Senate Report at 5.

If the timing of fee awards must take on flexibility to account for the "substantial hardship" that may result from delayed compensation, then it begs credulity to suggest that the term "reasonable attorney's fee" — which by its nature mandates discretion in the district courts and case-by-case determination, *see Hensley*, 461 U.S. at 429, 437 — must be read to ignore that same hardship.

In applying Section 1988, the lower courts have routinely provided compensation for delay in payment. [11/] As the Fourth Circuit has stated:

> Civil Rights litigation often spans several years, and consequently compensation under § 1988 often occurs long after the relevant services have been rendered. This delay in payment of attorney's fees "obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one".
>
> • • •
>
> Delay necessarily erodes the value of a fee that would have been reasonable if paid at the time the services were rendered. Consequently, an award based upon historic rates which does not take delayed payment into account will not be a fully compensatory fee.

Daly v. *Hill*, 790 F.2d 1071, 1081 (4th Cir. 1986) (quoting *Johnson* v. *University College*, 706 F.2d 1205, 1210 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983)).

11/ *See, e.g., Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945, 951, 955 (1st cir. 1984); *New York State Ass'n for Retarded Children* v. *Carey*, 711 F.2d 1136, 1152 (2d Cir. 1983); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Lightfoot* v. *Walker*, 826 F.2d 516, 523 (7th Cir. 1987); *Sisco* v. *J.S. Alberici Constr. Co.*, 733 F.2d 55, 59 n.3 (8th Cir. 1984); *Jordan* v. *Multnomah County*, 815 F. 2d 1258, 1262–63 n.7 (9th Cir. 1987); *Ramos* v. *Lamm*, 713 F.2d 546, 555 (10th Cir. 1983); *Gaines* v. *Dougherty County Bd. of Educ.*, 775 F.2d 1565, 1572 (11th Cir. 1985) (per curiam).

This Court has also recognized the propriety of these approaches, albeit in dictum:

> When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later, as in this case. Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by setting the fee based on historical rates to reflect its present value. . . . Although delay and the risk of nonpayment are often mentioned in the same breath, adjusting for the former is a distinct issue that is not involved in this case. We do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute.

Pennsylvania v. *Delaware Valley Citizens Council*, 107 S. Ct. 3078, 3081 (1987) (citations omitted); *see also id.* at 3099 (Blackmun, J., dissenting).

II.

SECTION 1988 AUTHORIZES THE AWARD OF FEES FOR PARALEGALS AT MARKET RATES

In *Blum* v. *Stenson*, 465 U.S. 886 (1986), this Court held that fees under Section 1988 "are to be calculated according to the prevailing mandet rate in the relevent community." *Id.* at 895. Accordingly, the district court in this case awarded Mr. Benson $225,085, and the LDF $431,338, in paralegal and law clerk fees, based on hourly rates of $35 for law clerks (law students), $40 for paralegals and $50 for recent law school graduates. Mr. Benson's law clerks and paralegals had worked 8,108 hours on the case; the LDF's law clerks, paralegals and recent law school graduates had worked 15,517 hours. The court of appeals affirmed the award, saying that "market considerations should govern, but it is not necessary to adopt an ironclad rule in this case." *Jenkins* v. *Missouri*, 838 F.2d 260, 266 (8th Cir. 1988). Numerous other

lower courts have held that market considerations should govern paralegal fees. [12/]

The paralegals in this case performed a variety of tasks that traditional clerical employees could not handle — tasks that would otherwise have fallen to lawyers. The two paralegals whose work made up 80 percent of Mr. Benson's paralegal claim were both college graduates. One had a B.A. in paralegal studies; the other has since graduated from law school. In this litigation, they assisted with document discovery and established the filing system. They interviewed witnesses. They summarized deposition transcripts and exhibits for expert witnesses. They prepared graphs, charts and exhibits for trial. They assisted at trial by logging the exhibits. (Johnson Aff., filed Jan. 16, 1987; Zinn Aff., filed Jan. 16, 1987.)

The State does not dispute that the work of paralegals in this case was reasonably necessary to prosecution of the action and contributed significantly to the result. The State does not dispute that the paralegal rate awarded reflected the market rate in the relevant community; it was in fact "a little bit below" the Kansas City average (Tr. 110). Nevertheless, the State contends that the paralegal work here should be compensated not at "prevailing market rates" — the measure prescribed by this Court, *Blum*, 465 U.S. at 895 — but at "cost." There is no basis for such a result.

12/ *See, e.g., Spanish Action Comm.* v. *City of Chicago*, 811 F.2d 1129, 1138 (7th Cir. 1987); *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d 43, 54 & n.7 (D.C. Cir. 1987) (30 U.S.C. § 1270), *vacated in part on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988); *Ramos* v. *Lamm*, 713 F.2d 546, 558-59 (10th Cir. 1983); *Richardson* v. *Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983) (Title VII) *cert. denied*, 464 U.S. 1009 (1983); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Vaughns* v. *Board of Educ.*, 598 F. Supp. 1262, 1283 (D. Md. 1984), *aff'd*, 770 F.2d 1244 (4th Cir. 1985); *Feher* v. *Department of Labor & Indus. Relations.*, 561 F. Supp. 757, 766 (D. Hawaii 1983).

A. The Result the State Seeks Would Undermine the Purpose of Section 1988

Separate billing for paralegals is an "increasingly widespread custom" in the legal community. *Ramos* v. *Lamm*, 713 F.2d 546, 558 (10th Cir. 1983). [13]/ And the record in this case confirms that the custom is to bill for that time at rates governed by market considerations, not at "cost." The evidence includes a 1986 Survey of Law Firm Economics, containing 1985 data (Pl. Ex. 4). That survey shows that, in metropolitan areas with populations over one million like Kansas City, paralegals' time was billed at an average hourly rate of $44 (*id.* at 58). But these paralegals were paid an average of $26,049 annually, including benefits, for an average of 1,355 billable hours, or $19.22 per billable hour (*id.* at 79, 129).

The legislative history of Section 1988 suggests strongly that compensation for the work of paralegals in civil rights cases should follow the custom of the market. The purpose of the statute is to promote effective private enforcement of the civil rights laws by "attract[ing] competent counsel in cases involving civil and constitutional rights." House Report at 9. And to accomplish this, Congress determined to provide awards similar to what "is traditional with attorneys compensated by a fee-paying client." Senate Report at 6. Thus, in *Blum*, the Court specifically rejected an argument, like the State's here, that fees under Section 1988 should "be calculated according to the cost of providing legal services rather than according to the prevailing market rate." 465 U.S. at 892.

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[13]/ The State notes that one of plaintiffs' witnesses, Kansas City attorney Max Foust, testified that he "does not bill separately for paralegal services" (Pet. Br. 6 n.5). Mr. Foust's custom, however, is irrelevant, since at least 90 percent of his current practice is based on contingent fee contracts (Tr. 61) — that is, he charges his clients a package price. He averages $400–$500 an hour for his time on these packages, and so doubtless can afford to throw in paralegals (*id.* at 79). Significantly, Mr. Foust testified that Kansas City law firms that bill on a per diem basis regularly charge between $40 and $50 an hour for paralegal services (*id.* at 67).

By definition, a lawyer can obtain from a paying client "the prevailing market rates in the relevant community" for the work of paralegals he or she employs. To hold that lawyers must receive less when they prevail in civil rights litigation is to discourage such litigation. And a prevailing civil rights lawyer denied market-based compensation for the work of paralegals cannot obtain what he or she could have received from a paying client.

A lawyer negotiating with a paying client has the option of either billing for paralegals at market rates or billing for that work at some approximation of cost, and raising his or her own hourly fee to achieve the same total compensation. Prevailing counsel in civil rights cases, however, do not have the latitude to negotiate a reallocation of their income between paralegal time and their own, because their own hourly rates must by law derive from the prevailing market rates. Denied market-based compensation for paralegal work, a prevailing civil rights lawyer would be unable to approximate the overall fee available from a paying client for comparable work. The purpose of Section 1988 would be undermined.

More specifically, the legislative history indicates that Congress approved of fee awards for paralegal work, calculated separately at hourly rates, and there is no indication that Congress intended such awards to be governed by anything other than market standards. The Senate Report cited three cases that "correctly applied" the "appropriate standards" set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). [14]/ (The Court, also, has recognized that these cases provide the benchmark of Congress' intent. *Blum*, 465 U.S. at 894; *Hensley*, 461 U.S. at 430–32.) In one of the cases cited by the Senate Report, the court had awarded $10 an hour for "statistical analysis, legal research, transcript summarization, interviewing, and general assistance carried out by a law clerk and a

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[14]/ Senate Report at 6 (citing *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 244, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974); *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975)).

paralegal assistant." *Davis* v. *County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048 (C.D. Cal. June 5, 1974). Although *Davis* did not state that the $10 rate was based on market rates, there is certainly no indication to the contrary. [15/] As this Court noted in *Blum*, the fee awards in *Davis* and the other cases cited by the Senate Committee "were calculated according to prevailing market rates. None of these four cases made any mention of a cost-based standard." 465 U.S. at 894 (footnotes omitted).

In all events, the "widespread custom" is, by definition, to charge for paralegals at market rates. If it were the practice in some community to charge "cost," that is precisely what the market would reflect. To single out prevailing civil rights lawyers, however, and to limit them to "cost" regardless of the custom in the relevant community, is to contravene the very essence of Section 1988, and to send civil rights plaintiffs to the back of the bus.

B. The Result the State Seeks Would Increase the Costs of Litigation

In recent years, with the increasing scope, complexity and expense of civil litigation generally, paralegals (or "legal assistants") have become an ever more familiar presence in the practice of law. Under the supervision of lawyers, they assist in the delivery of legal services by performing a variety of tasks that need not occupy the more costly time of lawyers, but require training, experience or ability different from those of other customary non-lawyer employees. The National Association of Legal Assistants, Inc., has characterized their function as follows:

> Legal assistants are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

Model Standards and Guidelines for Utilization of Legal Assistants (NALA 1984).

The legal profession recognizes the importance of paralegals. The American Bar Association has a Standing Committee on Legal Assistants. And the use of paralegals is widespread. According to the 1986 Survey of Law Firm Economics, law firms employed an average of one paralegal for every five lawyers in 1995, nationwide (Pl. Ex. 4 at 17). The United States Department of Labor has projected that the number of legal assistants will double from 53,000 in 1984 to 104,000 by 1995. Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Quarterly* (Spring 1986).

While paralegals naturally perform only those tasks that need not be performed by a lawyer, many of their tasks would fall to lawyers in the absence of paralegals, since the tasks fall between the skill levels of lawyers and non-legal employees. In consequence, the use of paralegals saves money. As discussed above, the paralegals in this case interviewed witnesses, digested discovery materials, prepared exhibits and assisted at trial. (*See supra* p. 27.) The courts have recognized that these are not clerical tasks. [16/] In the absence of paralegals, they would be performed by lawyers, at higher hourly rates.

[15/] To the extent any inference is possible, it is hard to conceive that a rate of $10 an hour in 1974 was derived in any manner comparable to that by which the State here calculated its proposed $15 rate more than a decade later. Moreover, the court in *Davis* awarded fees for work by attorneys at rates ranging from $35 to $60 an hour, the latter for an "able and experienced litigator." 8 Fair Empl. Prac. Cas. (BNA) at 245, 8 Empl. Prac. Rec. (CCH) ¶ 9444, at 5048. Those rates bear about the same relationship to the $10 rate for paralegals as do the rates awarded for attorneys to those for paralegals in this case.

[16/] *See, e.g., Richardson* v. *Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983) (paralegals "assisted the lawyers at trial" and "participated in telephone conferences with lawyers [and] witnesses"), *cert. denied*, 464 U.S. 1009 (1985); *Spray-Rite Serv. Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1250 (7th Cir. 1982) ("digesting and indexing discovery and trial materials"), *aff'd*, 465 U.S. 752 (1984); *Easter House* v. *Illinois Dep't of Children & Family Serv.*, 663 F. Supp. 456, 460 (N.D. Ill. 1987) ("organizing and compiling exhibits").

Accordingly, as courts have also recognized, "paralegal and law clerk personnel provide necessary services which, were they performed by attorneys, would be more costly." *Keith* v. *Volpe*, 501 F. Supp. 403, 413 (C.D. Cal. 1980); *see also Garmong* v. *Montgomery County*, 668 F. Supp. 1000, 1011 (S.D. Tex. 1987). And therefore, the use of paralegals "is to be encouraged by separate compensation in order to reduce the time of more expensive counsel." *Jacobs* v. *Mancuso*, 825 F.2d 559, 563 (1st Cir. 1987). Compensating for the work of paralegals as part of attorney's fees under Section 1988 "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes". *Cameo Convalescent Center, Inc.* v. *Senn*, 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

To compensate for paralegal work at anything less than market, however, is to discourage the use of paralegals and thus to discourage the cost-effective delivery of legal services. A potential civil rights lawyer who cannot be awarded a market rate for paralegals must either:

(a) forego civil rights work in favor of work for clients who will pay market for paralegals;

(b) accept civil rights cases, knowing that, regardless of the results obtained, he or she will receive less income than from a paying client; or

(c) accept civil rights work but use attorneys, at significantly higher hourly rates, to perform the chores that paralegals could do.

None of these alternatives is acceptable. The first would eviscerate the very purpose of Section 1988. The second is precisely the one that Section 1988 is meant to avoid. The third would make the litigation more costly for all concerned.

C. The State's Arguments Are Without Merit

Against all this, the State raises a number of arguments, each of which disintegrates under scrutiny.

First, the State contends that Congress did not specifically consider paralegal compensation in enacting Section 1988 (Pet. Br. 26). That statement, of course, is belied by the Senate Report's citation to *Davis* (*see supra* pp. 29-30). Even if the State were correct, however, the argument would prove nothing, for the standard under Section 1988 is the market and, in today's practice of law, paralegal fees are undeniably a part of attorney's fees customarily collected. A lack of specific consideration of paralegals by Congress would not suggest that their work should be compensated by some standard peculiar to them.

Second, the State contends that compensating for paralegal time at market rates produces a "windfall" for prevailing counsel because those market rates have "a built in profit factor within them" (Pet. Br. 26). Other than the State's *ipse dixit*, however, there is no reason to equate a market-determined rate with a "windfall." Partners in law firms — including those who earn fees under Section 1988 — ordinarily obtain a profit on the work of the attorneys they employ. The State does do not suggest there is anything improper about this. And there is nothing extraordinary about lawyers earning a profit on the work of the paralegals they employ as well — they customarily do so.

Profit from the work of employees is fundamental to any enterprise in our society. A partner in a law firm, like the owner of any business enterprise, is responsible for the activities of his or her employees in the scope of their employment. It is the partners in a law firm, again like the owners of any business, who bear the risk that fees will not be paid at all. And there is nothing novel or untoward about compensating them for responsibility and risk. To the contrary, the cost-based limit that the State seeks to impose would produce a "wind-

fall" for it: the State would pay only a small fraction of the amount charged a paying client for comparable paralegal services.[17]/

Third, the State argues that its proposed amendment to Section 1988 would make "costs easier to calculate" (Pet. Br. 27). The State cannot be serious. It takes little imagination to perceive the difficulties district courts would encounter in trying to apportion rent, secretarial salaries and benefits, equipment and the other components that make up overhead. By contrast, the market rates awarded here were proved by uncontroverted testimony and extensive, readily available studies. Their calculation involved no difficulty whatsoever.

The State deliberately chose neither to proffer evidence nor to conduct discovery needed to calculate the "costs" of paralegals. Now the State wants a remand to do what it should have done; or it wants this Court to adopt a $15 number plucked from the air. There is no reason to do either.

Fourth, the State suggests that paralegals' work should be compensated at cost because the paralegals here were hired specifically for this litigation (Pet. Br. 27). But nothing in the language, legislative history or policies of Section 1988 suggests such a distinction. [18]/ A fee-paying client could hardly avoid paying market rates for paralegal work simply because the paralegals involved were hired specifically for his or her case. And under the market standards articulated by this Court, that is dispositive.

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[17]/ According to the 1986 Survey of Law Firm Economics, the average 1985 billing rate for paralegals in the west-central region of the nation, which includes Kansas City, was $42 an hour (Pl. Ex. 4 at 52). For 73 percent of the paralegals surveyed in the region, their time was billed at or above the $40 an hour awarded here (*id.*). In metropolitan areas with populations greater than one million, the average billing rate for paralegals was $44 an hour (*id.* at 58). Sixty-five percent of the paralegals surveyed in such areas generated fees at or above $40 an hour (*id.*).

[18]/ The State purports to base this approach on *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979). That case, however, involved paralegals "not regularly" in counsel's employ, who had "volunteered a good deal of their time." *Id.* at 48. The court expressly stated that its opinion "does not relate to salaried paralegals in counsel's own office", such as the paralegals in this case. *Id.* at 48 n.3; *see Jacobs* v. *Mancuso*, 825 F.2d at 563.

In sum, to accept the State's cost-based approach to paralegal fees would send an unseemly — and costly — message to all lawyers: "If you need help on a civil rights case, use more lawyers, not paralegals."

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JAY TOPKIS
DANIEL J. LEFFELL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARTHUR A. BENSON, II
BENSON & MCKAY
911 Main Street,
Suite 1430
Kansas City, Missouri 64105
(816) 842-7603

RUSSELL E. LOVELL, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-3985

THEODORE M. SHAW
634 S. Spring Street
Los Angeles, California 90014
(213) 624-2405

Attorneys for Respondents

*Counsel of Record